U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-C-S- INC.

DATE: JULY 23, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT solutions development company, seeks to employ the Beneficiary as a project manager - test. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner, , was the successor-in-interest to the employer that filed the labor certification application, Thus, the Director determined that the petition is not supported by a valid labor certification.

On appeal, the Petitioner submits additional evidence and asserts that it is the successor-in-interest to

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is September 17, 2016. *See* 8 C.F.R. § 204.5(d).

approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. SUCCESSOR-IN-INTEREST

The Director concluded that the Petitioner did not establish that it was the successor-in-interest to the employer that filed the labor certification application. The Petitioner is Inc., with federal employer identification number . The employer that filed the labor certification application is with

The record shows that changed its name to on March 29, 2016.[2] The Petitioner states that it and were subsidiaries of Inc. It asserts that pursuant to a corporate reorganization on January 1, 2017, the Petitioner assumed all of the immigration-related obligations, liabilities, and undertakings of including its employees.

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).[3] First, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. *Id.* Second, the job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification. *Id.* at 482. Third, the successor must establish eligibility for the immigrant visa in all respects. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. The first condition - fully describing and documenting the transfer - is the one at issue in this case.

With the petition, the Petitioner submitted a letter dated February 23, 2017, stating that "is now called [4] and that the Petitioner assumed all of the immigration-related obligations, liabilities, and undertakings of on January 1, 2017.

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[2] The record contains a "Certificate of Incorporation pursuant to change of name" issued by the Government of India evidencing the name change.

[3] *See also* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* 3-4 (Aug. 6, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/2009%20Memos%20By%20Month/August%202009/Successor-in-Interest-8-6-09.pdf (last visited July 12, 2018) (2009 Neufeld Memo).

[4] The record indicates that this statement is incorrect. changed its name to The Petitioner, is a separate entity.

In response to a request for evidence (RFE) from the Director, the Petitioner submitted a corporate reorganization statement from its human resources manager dated December 31. The year it was executed was not listed. The statement indicates that the Petitioner has assumed all of the obligations under the labor condition applications filed by [redacted] together with a chart listing over 350 labor condition applications assumed by the Petitioner. In her decision, the Director indicated that the statement cannot be accepted as evidence because the date cannot be ascertained. Further, she noted that the statement was made pursuant to the regulation governing nonimmigrant petitions, which is not applicable to this immigrant petition.

In response to the RFE, the Petitioner also submitted a corporate reorganization declaration dated June 15, 2017, from its senior manager of finance, stating that on January 1, 2017, the Petitioner assumed all immigration-related obligations, liabilities, and undertakings arising from [redacted] It states that the Petitioner continues to operate the same type of business as [redacted] and that the terms of the offer of employment remain materially the same as those previously offered by [redacted] The Director stated that the declaration is not sufficient evidence of a corporate restructure because it does not document the transfer between the predecessor and successor.

In response to a second RFE from the Director, the Petitioner stated that [redacted] was "a *standlone*, operating subsidiary administering its own payroll until January 1, 2017."[1] The Petitioner submitted another corporate reorganization statement from its director of legal services dated August 2, 2017. The statement is similar to the one dated June 15, 2017, from its senior manager of finance. The Director indicated in her decision that the statement is not sufficient evidence of a corporate restructure because it does not document the transfer between the predecessor and successor. The Director further noted in her decision that the [redacted] requires a Petitioner to document the transfer by providing documents such as closing statements, SEC Forms, audited financial statements, copies of instruments used to execute the transfer, and media or other reports. The Director stated that the Petitioner had provided no documentation to support its claim of successorship.

On appeal, the Petitioner asserts that the January 1, 2017, reorganization was internal and was not subject to be addressed by the U.S. Securities and Exchange Commission (SEC), closing statements, or newspaper articles. It asserts that its corporate reorganization statements are sufficient to document the successorship. We sent the Petitioner an RFE and asked it to provide a letter from an authorized official of its organization which: (a) outlines the details of the reorganization; (b) describes the organizational structure of the organization prior to and after the reorganization; and (c) lists any location, management, or product change after the reorganization. We also asked it to provide copies of any financial instruments or other documents used to execute the reorganization, and copies of federal

[redacted] changed its name to [redacted] on March 29, 2016, then it should have been administering its payroll under the name [redacted] after that date.

employment tax returns for [redacted] and the Petitioner for the fourth quarter of 2016 and the first quarter of 2017.

In response to our RFE, the Petitioner submitted another corporate reorganization statement from its director of legal services dated June 27, 2018. It states that prior to January 1, 2017, [redacted] was an indirect subsidiary of [redacted] and an operating entity with U.S. employees in its [redacted] Washington branch office; and that after January 1, 2017, [redacted] U.S. employees were transferred to [redacted] It does not give a tax, business, or other purpose for the reorganization. It also restates the assertions from the June 15, 2017, and August 2, 2017, corporate reorganization statements. Although the reorganization may not have been subject to be addressed by the SEC, closing statements, or newspaper articles, the transfer of employees should have been reflected in the quarterly federal employment tax returns.

However, the Petitioner declined to provide the requested quarterly federal employment tax returns in response to our RFE. Instead, it states that the federal income tax returns of the two companies provide the requested documentation of the employee transfer. The Petitioner submits the IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, for [redacted] for the fiscal year covering July 1, 2016, to June 30, 2017. It also submits the IRS Form 1120, U.S. Corporation Income Tax Return, for the Petitioner for the fiscal year covering July 1, 2016, to March 10, 2017.[6] While the returns show total wages paid, they do not provide information about the individual employees of either company.[7] The quarterly employment tax returns would have demonstrated whether the employees of [redacted] became the employees of the Petitioner on January 1, 2017.[8]

Moreover, the Petitioner's certification of the transfer of employees is not sufficient to establish a valid successor relationship. In order qualify as a successor, the Petitioner must document the transfer of the rights, obligations, and ownership of the predecessor.[9] Although 100% acquisition of the predecessor is

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[6] The Petitioner did not indicate why its tax return covers less than an entire year.

[7] Also, because the Form 1120-F covers the period from July 1, 2016, to June 30, 2017, the wage information listed on the tax form covers part of 2016, when the company purportedly had employees, and part of 2017, when it purportedly had no employees. The Form 1120-F does not confirm that [redacted] paid no wages in 2017, following the purported transfer of all of its employees to the Petitioner. Similarly, the Petitioner's Form 1120 does not reflect a large increase in wages paid starting on January 1, 2017, as its tax form covers part of 2016 and part of 2017.

[8] IRS Form 941, Employer's Quarterly Federal Tax Return, shows the number of employees on a payroll for a pay period and wages paid. For certain mergers, acquisitions, or other reorganizations, a Schedule D to Form 941 must be filed. It appears that the Form 941 for [redacted] would have listed hundreds of employees in the last quarter of 2016 (based on the H-1B nonimmigrant workers it listed in a chart submitted with its response to the Director's first RFE), and no employees in the first quarter of 2017 (if filed). The Form 941 for the Petitioner for the first quarter of 2017 would have reflected a gain of those hundreds of employees following the reorganization.

[9] There is a difference between a change due to a successor-in-interest and simply a change of employer. Without documentation of the transfer of the rights, obligations, and ownership of the predecessor, the new employer is not a successor-in-interest and must obtain its own labor certification from the DOL.

not required, the successor must show that it acquired the essential rights and obligations to carry on the predecessor's business. Here, the Petitioner continues to assert, through its corporate restructuring statement, that it assumed the human capital assets (the employees) and all immigration obligations and liabilities. However, even if this were corroborated by the record, the transfer of the human capital and immigration obligations alone, would not be sufficient to establish that the Petitioner is the successor to because the Petitioner has not otherwise demonstrated that it is now vested with the rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. *See* Neufeld Memorandum, *supra*, at 8.

Further, the labor certification states that the Beneficiary was employed by as a project manager – test – in Maryland, from July 5, 2011, until the date the labor certification was filed on September 17, 2016. The record contains the Beneficiary's paychecks for several pay periods 2016 and 2017,[10] and his IRS Form W-2, Wage and Tax Statement, for 2016. The Petitioner asserts that these documents evidence the reorganization on January 1, 2017. However, in 2016, the Beneficiary's paychecks and Form W-2 were issued by in Texas.[11] The paychecks and Form W-2 were not issued by (formerly known as in Washington. The Petitioner has not resolved this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the 2016 paychecks and Form W-2 do not support the Petitioner's assertion that the Beneficiary was employed by (formerly known as until January 1, 2017. Further, the Beneficiary's address listed on his Form W-2 and paychecks is located in Maryland. It is not clear how the Beneficiary worked in Washington, yet lived in Maryland. *Id.* A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met its burden to fully describe and document the reorganization in this case.

The record does not fully describe and document the transfer of the predecessor by the purported successor. Thus, the Petitioner has not established that it is the successor-in-interest to the labor certification employer, and the petition is not supported by a valid labor certification.

III. RECRUITMENT

Although not mentioned by the Director in her decision, the recruitment for the offered job was conducted, and the labor certification was filed, using the wrong entity name.

[10] In 2017, his paychecks were issued by the Petitioner, with a California address.

[11] Although the EIN for is the same as the EIN for the names and addresses of the companies are not the same.

DOL's regulations require an employer to give notice of the filing of the application for permanent employment certification,[12] to conduct required pre-filing recruitment including placing a job order and advertisements in a newspaper or professional journal,[13] and to prepare a recruitment report[14] as part of a pre-filing recruitment effort. This allows DOL to determine whether an organization put forth good faith efforts to recruit U.S. workers which meet the regulatory attestations found at 20 C.F.R. § 656.10(c).[15] The Petitioner submitted copies of the recruitment efforts for the offered job, including the notice of the filing (posted July 27, 2016, to August 9, 2016, using the name job order (posted June 3, 2016, to July 2, 2016, using the name advertisements in newspapers (run on June 16, 2016, and June 26, 2016, using the name internet advertising (posted June 17, 2016, to July 16, 2016 using the name internal website (posted July 27, 2016, to August 17, 2016, using the name , and trade journals (run on July 1, 2016, using the name All of its recruitment was done using name, despite its prior name change to on March 29, 2016. Further, the prevailing wage determination was filed on May 25, 2016, using the name despite its prior name change.

[12] 20 C.F.R. § 656.10(d).
[13] 20 C.F.R. §§ 656.17(e), (f).
[14] 20 C.F.R. § 656.17(g).
[15] According to 20 C.F.R. § 656.10(c), the employer must certify to the conditions of employment listed below on the labor certification under penalty of perjury:

> (1) The offered wage equals or exceeds the prevailing wage determined pursuant to [20 C.F.R. §§ 656.40, 656.41], and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment;
> (2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;
> (3) The employer has enough funds available to pay the wage or salary offered the alien;
> (4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;
> (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
> (6) The employer's job opportunity is not:
> (i) Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage;
> (ii) At issue in a labor dispute involving a work stoppage.
> (7) The job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law;
> (8) The job opportunity has been and is clearly open to any U.S. worker;
> (9) The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons;
> (10) The job opportunity is for full-time, permanent employment for an employer other than the alien.

In addition, the labor certification was filed under the name [redacted] on September 17, 2016. When asked to explain the discrepancy, the Petitioner's RFE response indicated that it used the [redacted] name on the labor certification because it wanted to ensure that it attracted the widest pool of qualified U.S. workers, and because it completed "test advertisements" under the [redacted] name. It also indicated that it filed the labor certification under the [redacted] name because the "DOL PERM registration was still under [redacted] name."[16]

According to the DOL, an employer must conduct recruitment using its legal name at the time of the recruitment, and a labor certification "must be filed in the name of the employer's legal name at the time of submission." DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!143 (last visited July 12, 2018). Thus, any recruitment conducted after March 29, 2016, should have been conducted using the name [redacted] Further, the labor certification should have been filed using the name [redacted] The recruitment was conducted, and the labor certification was filed, using the wrong entity name. For this additional reason, the petition is not supported by a valid labor certification.

IV. CONCLUSION

The Petitioner has not established that it is the successor-in-interest to the employer that filed the labor certification application. Thus, the petition is not supported by a valid labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-C-S- Inc.*, ID# 1068709 (AAO July 23, 2018)

[16] Before filing a labor certification electronically, the employer must register and establish an account using the permanent online system (PERM). Registered users can add new employer information, and view or edit the employer's business and contact information, online. DOL Permanent Online System User Guide, https://www.plc.doleta.gov/onlinehelp.pdf (last visited July 12, 2018). It is not clear why the labor certification employer did not edit its information in the PERM system.